

Message Text

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PAGE 01 EC BRU 01014 302116Z

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SUBJECT: OECD GOVERNMENT PROCUREMENT CODE-- FIELD OF APPLICATION
OF THE INSTRUMENT

REF: (A) STATE 20501, (B) 1975 EC BRUSSELS A-391, (C) 1975
EC BRUSSELS 8263

1. SUMMARY: ALTHOUGH THE EC COMMISSION HAS THE INTENTION
OF EXCLUDING CERTAIN PURCHASING ENTITIES (POWER GENERATION, TRANSPORT

,
TELECOMMUNICATIONS) FROM THE MANDATORY PROVISIONS OF THE OECD
GOVERNMENT PROCUREMENT CODE, THESE ENTITIES STILL COULD BE SUB-
JECT TO MORE OPEN PROCUREMENT BY EST EFFORTS NON-DISCRIMINATION
CLAUSE IN THE CODE. END SUMMARY.

2. ON JANUARY 29 THE MISSION SPOKE WITH EC COMMISSION OFFICIAL
JEAN-PIERRE DERISBOURG REGARDING THE FIELD OF APPLICATION
OF THE DRAFT OECD CODE ON GOVERNMENT PROCUREMENT. AS THE
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PAGE 02 EC BRU 01014 302116Z

EC'S DRAFT DIRECTIVE ON GOVERNMENT PROCUREMENT EXCLUDES
PURCHASING ENTITIES IN POWER GENERATION, TRANSPORTA-

TION AND PROBABLY TELECOMMUNICATIONS WE WANTED TO CONFIRM OUT UNDERSTANDING THAT THIS MEANT THAT THESE PURCHASING ENTITIES WOULD NECESSARILY BE EXCLUDED FROM THE OECD CODE (SEE REFERENCE B AND C).

3. DERISBOURG PROVIDED AN INTERESTING RESPONSE. THE EC'S POSITION IS THAT PURCHASING ENTITIES EXCLUDED FROM THE DRAFT DIRECTIVE WOULD ALSO BE EXCLUDED FROM THE CODE. HOWEVER, THE COMMISSION WOULD WANT THEM TO BE SUBJECT TO EC GOVERNMENT PROCUREMENT RULES AT A LATER DATE. EVENTUALLY A NEW DIRECTIVE WILL BE PROPOSED WHICH COULD BE BASED ON ROME TREATY ARTICLE 90 (1 UNDERTAKINGS ENTRUSTED WITH THE OPERATION OF SERVICES OF GENERAL ECONOMIC INTEREST...). WHEN SUCH ENTITIES ARE THUS SUBJECT TO EC GOVERNMENT PROCUREMENT RULES, THERE CAN BE A NEW INTERNATIONAL NEGOTIATION TO EXTEND THE COVERAGE OF THE OECD (INTERNATIONAL) GOVERNMENT PROCUREMENT CODE.

4. DERISBOURG POINTED OUT, HOWEVER, THAT ALTHOUGH THE PURCHASING ENTITIES INVOLVED IN POWER GENERATION, TRANSPORTATION AND TELECOMMUNICATIONS WOULD NOT, BE SUBJECT TO THE PROCUREMENT RULES OF THE INITIAL, LIMITED CODE, THEY WOULD NONETHELESS, NOT NECESSARILY BE FREE TO DO AS THEY PLEASED. SIGNATORY GOVERNMENT COULD AGREE THAT THEY WOULD USE THEIR BEST EFFORTS TO INSURE THAT SUCH ENTITIES DID THEIR PURCHASING ON A NON-DISCRIMINATORY BASIS. DERISBOURG OBSERVED THAT IT WOULD BE VERY DIFFICULT TO WORK OUT TRANSPARENCY RULES, FOR THESE ENTITIES WHICH WERE QUASI GOVERNMENTAL. HOWEVER, HE SAID THAT IF THEY DISCRIMINATED IN THEIR PROCUREMENT PRACTICES, AGGRIEVED SUPPLIERS COULD BRING ACTIONS AGAINST THEM IN NATIONAL COURTS. THERE WOULD ALSO BE REMEDIES BASED UPON GOVERNMENT'S FAILURES TO MAKE BEST EFFORTS. DERISBOURG NOTED THAT THERE WOULD HAVE TO BE RECIPROCITY ON BEST EFFORTS TOWARDS NON-DISCRIMINATION.

5. COMMENT. SINCE THE OECD COUNTRIES ARE GOING TO BE REFLECTING ON THE DRAFT CODE (SEE REFTTEL A) WE LIMITED OFFICIAL USE
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PAGE 03 EC BRU 01014 302116Z

THOUGHT DERISBOURG'S COMMENTS MIGHT BE USEFUL. BIG TICKET ITEMS ARE WHAT INTEREST THE US IN THE AREAS THE EC WOULD EXCLUDE FROM AN INITIAL OECD CODE, (E.G., POWER GENERATION, EQUIPMENT, TELEPHONE SWITCHING EQUIPMENT). IF THERE WERE A CLAUSE ON NON-DISCRIMINATION IN THE CODE, IT WOULD DISALLOW THE CURRENT PRACTICE OF EUROPEAN POWER COMPANIES TO LIMIT INVITATIONS TO TENDER TO A SMALL NUMBER OF NATIONAL SUPPLIERS. LARGE US FIRMS ARE LIKELY TO KNOW OF MAJOR PURCHASES BY POWER COMPANIES OR PTTS SO PUBLICITY REQUIREMENTS SEEM

LESS IMPORTANT HERE. WE ARE IN NO POSITION TO JUDGE
IF THE VERY PARTICULAR NATURE OF THE PURCHASING BY THE
EXCLUDED ENTITIES IS SUCH THAT WE WOULD RISK PLACING
OUR CONFIDENCE IN NON-DISCRIMINATION AND BEST EFFORTS
CLAUSES IN THE OECD CODE. WASHINGTON IS IN A BETTER
POSITION TO ANSWER WHETHER SUCH AN APPROACH WOULD BE
HELPFUL TO US "BIG-TICKET" EXPORTERS.
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